Filed 4/20/10 P. v. Simpson CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH KENNETH SIMPSON, Defendant and Appellant.	C060731 (Super. Ct. No. CM029232)

Defendant Joseph Kenneth Simpson entered a negotiated plea of no contest to felony evading (Veh. Code, § 2800.2) and vehicle theft (Veh. Code, § 10851, subd. (a)), and admitted a prior prison term allegation (Pen. Code, § 667.5, subd. (b)), in exchange for dismissal of the remaining count (Veh. Code, § 2800.4) with a waiver pursuant to *People v. Harvey* (1979) 25 Cal.3d 754.

The court sentenced defendant to state prison for an aggregate term of four years eight months, that is, the upper term of three years for felony evading; a consecutive one-third the midterm, or eight months, for vehicle theft; and one year for the prior prison term. The court also resentenced defendant

in case No. CM027889 to a consecutive one-third the midterm, or eight months, for petty theft with a prior. (Pen. Code, § 666.)

Defendant appeals. He did not obtain a certificate of probable cause. (Pen. Code, § 1237.5.) He contends that the trial court erred in imposing a consecutive sentence for felony evading and vehicle theft. He also contends that the trial court erred in awarding presentence custody credit. We reject both contentions.

In view of defendant's contentions, only a brief recitation of the facts is required. As stipulated at the entry of plea hearing, defendant, while a parolee-at-large, led an officer on a chase for 45 minutes at speeds up to 80 miles per hour. Several vehicles had to take evasive action. Defendant got out of his vehicle at some point and stole a truck, leading the officer on a continued chase.

With respect to consecutive sentencing for felony evading and vehicle theft, the People initially respond that defendant is barred from raising the issue because he failed to obtain a certificate of probable cause, citing *People v. Shelton* (2006) 37 Cal.4th 759, 769 (*Shelton*), *People v. Cuevas* (2008) 44 Cal.4th 374, 384 (*Cuevas*), and *People v. Rushing* (2008) 168 Cal.App.4th 354, 362 (*Rushing*). We agree.

Defendant entered his plea in exchange for dismissal of the remaining charge. Although there was no agreement as to a sentencing lid, the plea form reflects the maximum amount of time defendant faced as a result of his plea, that is, four years eight months. The parties mutually understood that a

maximum of four years eight months could be imposed. Defendant's challenge based on Penal Code section 654 is a challenge to the validity of the plea and requires a certificate of probable cause. (*Cuevas*, *supra*, 44 Cal.4th at p. 384; *Shelton*, *supra*, 37 Cal.4th at p. 769.) Dismissal of the other charge, a violation of Vehicle Code section 2800.4 (evading an officer against traffic), was "sufficient consideration to enforce the plea bargain and require a certificate of probable cause before defendant disturbs the maximum term to which he agreed." (*Rushing*, *supra*, 168 Cal.App.4th at p. 362.) Defendant is barred from raising the section 654 issue. In any event, facts support the imposition of consecutive sentencing. Defendant had dual intents in the sense that he had opportunity to reflect whether to continue to flee. He jumped out of his vehicle and stole a truck. Section 654 did not bar imposition of consecutive sentences.

With respect to presentence custody credit, defendant contends that he should have received 113 actual days for the time spent in custody from the date of his arrest to the date of sentencing. We reject this contention. At the entry of plea hearing, defense counsel agreed that defendant was a parolee-at-large at the time of his arrest. The probation officer recommended no credit toward the current offenses for the time spent in custody from the date of defendant's arrest to the date of sentencing based on *People v. Bruner* (1995) 9 Cal.4th 1178 (*Bruner*). At sentencing, the prosecutor and probation officer explained that defendant had violated parole by absconding, that

he had also failed to appear after having been sentenced in case No. CM027889, and that the absconding charge was not connected. Defense counsel complained that he had not seen anything to explain that defendant had been a parolee-at-large, although that "may very well be true," and asserted that defendant "should still get 113 days" toward case No. CM027889 "because he's technically a state prisoner doing time." The court determined that defendant should get "state time" for the 113 days, either toward the parolee-at-large case or case No. CM027889.

Defendant has failed to demonstrate that he would have been free from custody "but for" the conduct in the current case (case No. CM029232). (*Bruner*, *supra*, 9 Cal.4th at pp. 1193-1194.) The probation officer represented that defendant was a parolee-at-large for absconding when he was arrested in the current case. At the entry of plea hearing, defense counsel agreed to the factual basis that defendant was a parolee-at-large when arrested in the current case. Defendant did not submit any contrary evidence. Thus, any time spent in custody would be attributable to the case in which he had violated parole. His conduct in the parole case, absconding, is independent of the current charged offenses. On this record, he is not entitled to the 113 days as presentence custody credit.

As previously stated, the court also resentenced defendant in case No. CM027889, for which the court awarded 64 actual days

and 32 days of conduct credit.[1] Pursuant to this court's miscellaneous order No. 2010-002, filed March 16, 2010, we deem defendant to have raised the issue (without requesting supplemental briefing) of whether amendments to Penal Code section 4019, effective January 25, 2010, apply retroactively to his pending appeal and entitled him to additional presentence credits. As expressed in the recent opinion in *People v. Brown* (2010) 182 Cal.App.4th 1354, we conclude that the amendments do apply to all appeals pending as of January 25, 2010. Defendant is not among the prisoners excepted from the additional accrual of credit. (Pen. Code, § 4019, subds. (b), (c); Stats. 2009, 3d Ex. Sess., ch. 28, § 50.) Consequently, defendant, having served 64 actual days of presentence custody, is entitled to 64 days of conduct credits in case No. CM027889.

DISPOSITION

The judgment is modified to provide for 32 additional days of conduct credit, resulting in 64 actual days, 64 conduct days, and 128 days of presentence custody credit in case No. CM027889. The trial court is directed to prepare an amended abstract of judgment accordingly and to forward a certified copy to the

---

[1] Although defendant's notice of appeal lists only case No. CM029232, the court resentenced defendant in case No. CM027889 at the same time it imposed sentence in case No. CM029232, and the credits appear on an abstract of judgment that lists both cases and the sentences in both cases. Because the court was required to determine all presentence custody credit in both cases and record the credit on an abstract of judgment (Cal. Rules of Court, rule 4.472), we will modify the custody credit in case No. CM027889.

Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

RAYE, J.

We concur:

SCOTLAND, P. J.

NICHOLSON, J.